

No. ~~89-1934~~

Supreme Court, U.S.
FILED

JUN 7 1990

JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court Of The United States

OCTOBER TERM, 1989

RAYMOND FRANCIS BAYERLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

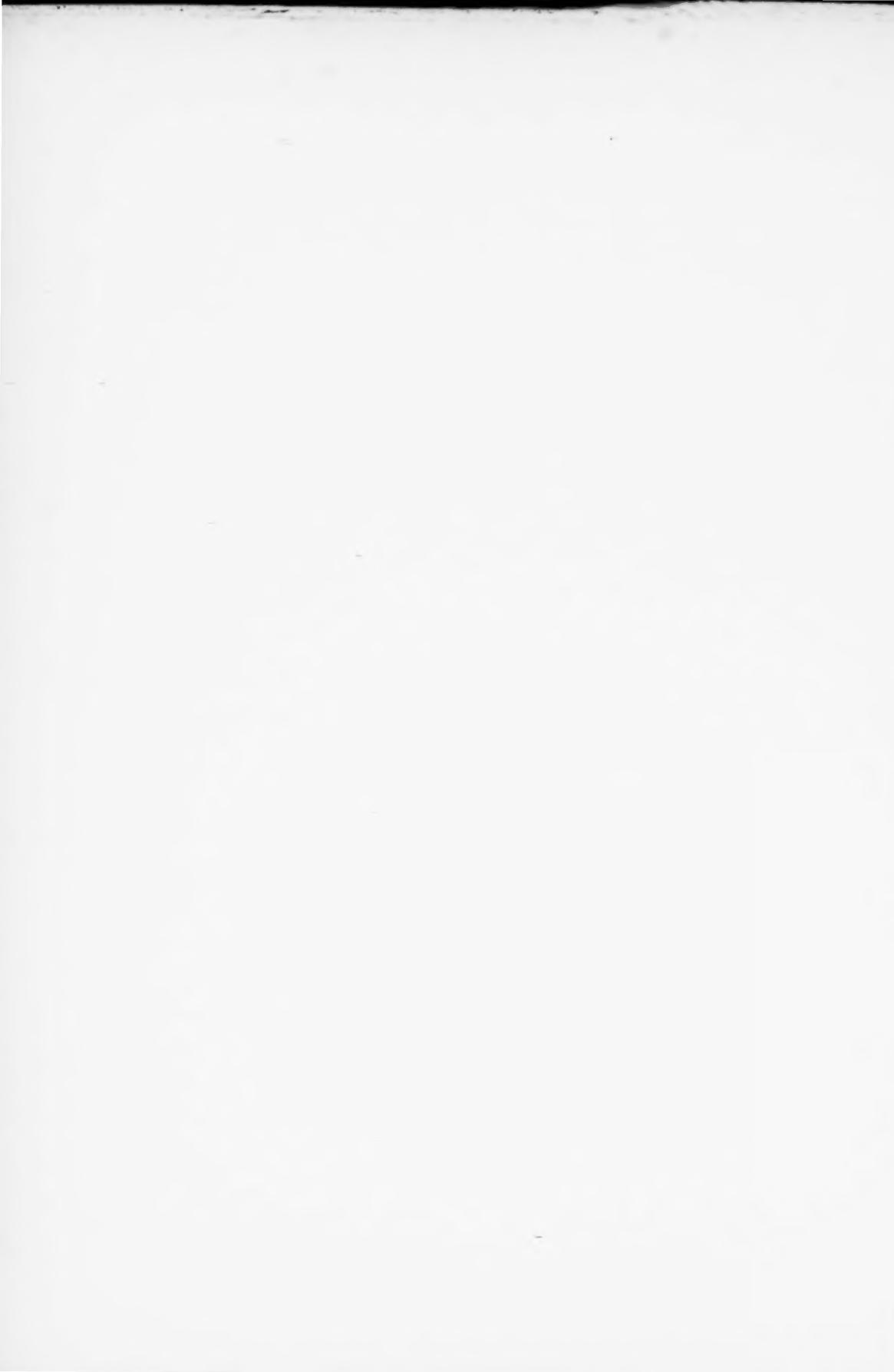
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Domenic R. Iamele
LEVY & IAMELE
114 E. Lexington Street
Suite 702
Baltimore, Maryland 21202
(301) 752-6160

Counsel for Petitioner



QUESTION PRESENTED

- I. WHETHER THE FEDERAL SENTENCING
GUIDELINES VIOLATE A DEFENDANT'S
FIFTH AMENDMENT RIGHT TO DUE
PROCESS AND EQUAL PROTECTION OF
LAW WHEN THE " ANY DETECTABLE
TRACE" STANDARD IS EMPLOYED TO
DETERMINE A QUANTITY OF A
PRESCRIPTION DRUG WHICH IS
GREATER THAN THE SPECIFIC
QUANTITY PRESCRIBED?



TABLE OF CONTENTS

Table of Authorities.....	ii
Opinion Below.....	2
Jurisdiction.....	2
Statutory Provisions Involved....	3
Statement of the Case.....	3
Reasons for Granting Certiorari	
TO SENTENCE ON THE BASIS OF THE GROSS WEIGHT AND TRANSFORMATION OF PHARMACOLOGICALLY PRESCRIBED DRUGS TO A HEROIN EQUIVALENCY, IS AN UNCONSTITUTIONAL VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS TO BE SENTENCED ON ACCURATE AND RELIABLE INFORMATION.....	10
Conclusion.....	23
Appendix.....	26

TABLE OF AUTHORITIES

Cases

<u>United States v. Bayerle</u> , 898 F.2d 28 (4th Cir. 1990).....	passim
<u>United States v. Tucker</u> , 404 U.S. 443 (1972)	9
<u>United States v. Whitehead</u> , 849 F.2d 849 (4th Cir. 1988)	8

CONSTITUTIONAL PROVISIONS

Fifth Amendment of the United States Constitution.....	passim
--	--------

STATUTES

18 U.S.C. 53(b)	3
21 U.S.C. §811(c)(1), 829(a), 960 (6)(1) (A)	3
28 U.S.C. 911.....	3
Federal Sentencing Guidelines.....	3

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

RAYMOND FRANCIS BAYERLE,
PETITIONER

v.

UNITED STATES OF AMERICA
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

The Petitioner, Dr. Raymond F. Bayerle, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on March 9, 1990.

OPINION BELOW

On March 9, 1990, the United States Court of Appeals for the Fourth Circuit affirmed in part, dismissed in part by published opinion the decision of the United States District Court for the District of Maryland to impose upon Petitioner a Sentence of 121 months in accordance with the Federal Sentencing Guidelines. United States v. Bayerle, 898 F.2d 28 (4th Cir. 1990) App. 1.

JURISDICTION

On March 9, 1990, the United States Court of Appeals for the Fourth Circuit affirmed in part, dismissed in part by published opinion the decision of the United States District Court for the District of Maryland to impose upon Petitioner a sentence of 121 months in accordance with the Federal Sentencing Guidelines. The jurisdiction of this Court is invoked under 28 U.S.C. Section

1254 (1). See Supreme Court Rule. 17.1
(a), (c).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are: United States Constitution, Fifth Amendment, 18 U.S.C. § 3953(b), 21 U.S.C. §811(c)(1), 841(a), 960(6)(1)(A), 28 U.S.C. 991 and the Federal Sentencing Guidelines. All statutory provisions are found in the Appendix.

STATEMENT OF THE CASE

The instant case presents this Court with a novel issue and one of public concern.

On September 28, 1988, Dr. Raymond Francis Bayerle was arrested pursuant to a Warrant for Arrest issued by the United States District Court for the District of Maryland. The Grand Jury sitting in that Court indicted Dr. Bayerle, charging him with conspiracy to distribute, and possession with intent to distribute and

dispense dilaudid (hydromorphone) and dolophine (methadone), in violation of Title 21, United States Code, §841; both drugs are Schedule II Narcotic Controlled Substances.

Dr. Bayerle pled guilty to the charges against him. Because of his acceptance of responsibility and cooperation with the United States Attorney's office, the government recommended a reduced Base Offense Level of 32. Pending sentencing, the Court released Dr. Bayerle to the Volunteers of America Halfway House.

On June 9, 1989, the Honorable John R. Hargrove of the United States District Court for the District of Maryland sentenced Dr. Bayerle to the lowest sentence for that Base Offense Level, 121 months. App. 6. The sentence was based entirely on the gross weight of the pills.

The events leading up to the arrest

and conviction of Dr. Bayerle can be briefly stated. Dr. Bayerle, a respected and well liked doctor, practiced emergency room medicine for approximately 10 years. Due to the daily, constant pressure of emergency room medicine, and work in excess of eighty hours per week, Dr. Bayerle left emergency room medicine.

Shortly thereafter, Dr. Bayerle's family, friends, and co-workers noticed an alarming changes in his personality.

From January, 1982, to September, 1988, Dr. Bayerle's condition worsened to the point where he became psychologically dysfunctional. It was during this period that he was approached by several individuals (prior patients) to whom he eventually sold completed prescriptions for dilaudid and dolophine. As Dr. Bayerle's mental condition deteriorated, he was unable to resist the repeated requests by these individuals. Dr.

Bayerle then began selling prescription at a rate of \$1.00-\$2.00 for each prescribed pill. In all, Dr. Bayerle sold prescriptions for approximately 33,420 dilaudid tablets and 4,150 dolophine tablets; however, at least one third of these were legitimate prescriptions for patients who were under medical treatment by Dr. Bayerle at his clinic.¹

Unlike most controlled substance mixtures, the weight and amount of narcotics in prescription drugs is determined and controlled by the physician. As such, the exact amount of narcotics in each pill of any prescription is exactly known by the prescribing doctor. In this case, Dr. Bayerle prescribed 4 mgs. of narcotic substance

1) This fact was stipulated by the United States Assistant Attorney at the sentencing hearing.

for each dilaudid tablet; notwithstanding the fact that each tablet weighed exactly .09 grams.

Dr. Bayerle appealed to the United States Court of Appeals for the Fourth Circuit, arguing that his Due Process rights had been violated because his sentence was based on the gross weight of the pharmacological drugs which had been converted to a heroin equivalency, instead of the actual weight of the controlled substance involved. The Fourth Circuit affirmed the District Court's sentencing procedure. 898 F.2d at 31. The Court found that Dr. Bayerle's Due Process rights were not violated by 21 U.S.C. §841(b)(1) because the gross weight scheme was rationally related to the legislative goals behind the law. Id. at 31.

In reaching its decision, the Court analogized the constitutionality of the

Drug Equivalency Tables with the constitutionality of sentencing by the quantity of the contraband without regard to its purity. Specifically, the Court used United States v. Whitehead, 849 F.2d 849 (4th Cir. 1988) to justify its decision in the present case. In Whitehead, the Defendant challenged the classification for sentencing purposes by the quantity of the contraband without regard to its purity. 849 F.2d at 859. The court upheld the statute in question, 21 U.S.C. §841(b)(1) finding that the rational basis test was satisfied. 849 F.2d at 859-60.

The Fourth Circuit reasoned that, "the equivalency tables complained of here are simply an extension of the scheme we upheld in Whitehead." Bayerle, 898 F.2d at 31. Because the Court perceived the Drug Equivalency Tables as an extension of the "detectable amount" standard, the

Drug Equivalency Tables satisfied the rational basis test. Id. at 32.

In its determination, the Fourth Circuit erroneously overlooked United States v. Tucker, 404 U.S. 443 (1972). In Tucker, the defendant was found guilty of armed robbery. Before imposing sentencing, the District Judge conducted an inquiry into the Defendant's background. The inquiry showed three previous felony convictions. The judge then sentenced him to the maximum term, 25 years. Tucker, 464 U.S. at 444.

Several years later, two of the three previous felony convictions were found to be constitutionally infirm because of the lack of counsel. As such the Defendant filed a motion in Federal District Court claiming that the introduction at trial of his prior invalid convictions tainted the jury's verdict. Id. at 445.

Upon review, this Court held

that although a judge at sentencing has broad discretion, he may not impose a sentence based on data founded in part on misinformation and material untruths. Id. at 447.

By using the detectable amount standard for prescription drugs, the Sentencing Guidelines force a judge to use misinformation and material untruths. This petition for a Writ of Certiorari follows the Fourth Circuit's affirmance in part and dismissal in part of the District Court's sentencing of Dr. Bayerle.

REASONS FOR GRANTING CERTIORARI

TO SENTENCE ON THE BASIS OF THE GROSS WEIGHT AND TRANSFORMATION OF PHARMACOLOGICALLY PRESCRIBED DRUGS TO A HEROIN EQUIVALENCY, IS AN UNCONSTITUTIONAL VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS TO BE SENTENCED ON ACCURATE AND RELIABLE INFORMATION.

The facts of this case as summarized in the opinion of the Fourth Circuit establish that the pre-sentence report used to determine Dr. Bayerle's base

offense level, calculated the combined gross weight of the dilaudid and dolophine tablets, which were then standardized through the use of the Drug Equivalency Tables, set out in the commentary to U.S.S.G. Section 2D 1.1. The total gross weight was converted to its heroin equivalency. The report established a base offense level from the heroin equivalency in accordance with the drug quantity table in Section 2D 1.1(c).

United State v. Bayerle, 898 F.2d at 30. This resulted in a significant increase in the prison term for Dr. Bayerle. In the instant case, the amount of controlled substance converted was contained in 33,420 dilaudid tablets and 4,150 dolophine tablets. Each dilaudid had no more than four (4) milligrams of dilaudid per pill. Each dolophine tablet had no more than ten (10) milligrams of dolophine per tablet. On the basis of the total

alleged, there were 133,680 milligrams for all of the tablets of dilaudid involved. This converts into 133 grams and, divided by approximately 28 grams per ounce, results in the controlled substance being only four ounces. The heroin equivalency multiplier as related to the dilaudid is arbitrary and capricious, because when one uses the 2.5 multiplier to bring the amount of dilaudid to a heroin equivalency based on the gross weight of the pills, it results in 332.5 grams or 11.87 ounces of the controlled substance; almost 8 ounces more than the actual controlled substance involved.

As to the dolophine tablets, as stated there were 4,150 pills. Each of these tablets had ten (10) milligrams of dolophine. There were 41,500 milligrams of dolophine or 41.5 grams. Dividing this figure by approximately 28 grams per ounce, there was a total of dolophine of

1.5 ounces. This calculation benefits Dr. Bayerle, which validates even more that the conversion into heroin equivalency is arbitrary and capricious. On one hand it is beneficial, while on the other it proves harmful. There is simply no uniform consistency when the heroin equivalency calculation is used.

This formula for calculation of sentences results in a substantial Due Process violation against Dr. Bayerle and other persons who violate prescription drug statutes. The potential prison term is unnecessarily increased. In the present case, Dr. Bayerle's sentence should have been four to six years rather than the ten years (Base Offense level of 32) he received, if the prescriptive drugs had not been subjected to being transformed into a heroin equivalency, based on total gross weight of the pills.

The question presented in the

instant case is a novel one for this Court, as it was for the Fourth Circuit. The Fourth Circuit rejected Dr. Bayerle's position. The Court erroneously relied upon United States v. Whitehead, 849 F.2d 849 (4th Cir. 1988) in deciding this case. In Whitehead, the appellants challenged as arbitrary and capricious, 21 U.S.C. §841(b)(1)(B), classification of penalties. This classification focuses upon the quantity of contraband found without regard to its purity or the role of the offender. Appellants further alleged that absent any rational basis, the statute violated their Fifth Amendment Due Process and Equal Protection Rights. In response to their challenge, the court delved into the legislative history of the Narcotics Penalties and Enforcement Act. The Court determined that the history clearly indicated Congress consciously chose the "any detectable amount standard"

(also referred to as the "market oriented approach") to classifying various penalties for drug offenses. According to the legislative history, Congress wanted to concentrate on persons "responsible for creating and delivering large quantities," including sellers of "substantial street quantities." Whitehead, 849 F.2d at 859, (quoting H.R. Rep. No. 845, 99th Cong. 2d. Sess., Pt. 1 at 12 (1986) (Report of the House Committee of the Judiciary)). Therefore, the Court upheld the standard of any detectable amount of substance for sentencing purposes.

The Court in Bayerle extended Whitehead by analogizing the Drug Equivalency Tables to be an extension of the "any detectable amount standard." The Court used the commentary to §2D1.1 to support its decision. The commentary states that the commission "has used the sentences provided in and equivalencies derived from

the statute (21 U.S.C. §841(b)(1)) in the Drug Equivalency Tables in order to provide conversion factors for hosts of illegal substances not explicitly treated within the statute." U.S.S.G. §2D1.1, comment. (n. 10). The Court went on to quote a note to §2D1.1(c) that stated, "the weight of a controlled substance...refers to the entire weight of any mixture or substance containing a detectable amount of a controlled substance". Although the note refers only to the Drug Quantity Table, the Court held that the Drug Equivalency Tables were simply an extension of the Drug Quantity Tables as upheld in Whitehead. Bayerle, 898 F.2d at 31.

The Drug Equivalency Tables neglect to focus upon controlled substances distributed through the means of a prescription. This oversight results in an arbitrary and capricious system that

is against public policy. The lack of recognition of the weight and type of prescription drugs is unreasonable.

The thrust of the present issue is the use of inaccurate, unreliable information used to incarcerate a defendant. This Court held in United States v. Tucker, 404 U.S. 443, 447 (1972), that Due Process rights are violated when a sentencing judge utilizes inaccurate and unreliable information to sentence a Defendant. The sentence is then based upon "misinformation" of a "constitutional magnitude." When accurate information is available and reliable, there is no justification for violating Fifth Amendment Due Process Rights by using erroneous and non-scientific weight to determine a Defendant's potential prison term. The Fourth Circuit overlooked the principles set forth in Tucker.

The trial court in the present case before this Court, made use of unreliable and inaccurate information. The equating of prescription drugs to a vague, unscientific formula to determine a length of sentence violated Dr. Bayerle's Fifth Amendment Due Process and Equal Protection rights.

The Controlled Substance Penalties Act of 1983, the Anti-drug Abuse Act, and the Sentencing Commission's Guidelines have shifted the emphasis on drug offense sentence determination from the type of drugs to the quantity of drugs. This shift has made the calculation of drug weight and classification the decisive factor in the length of a sentence, thus increasing the constitutional significance of its accuracy.

The information used by the Criminal Justice System to determine the length of time a Defendant should spend incarcerated

must be accurate and reliable.

It should at the very least withstand a preponderance of the evidence standard. The Criminal Justice System cannot be permitted to rely on questionable information especially when accurate, reliable information is so readily available.

The Sentencing Commission addressed the nettlesome problem of calculating street drug weight by using the "any detectable amount" standard: if there is any detectable trace of any controlled substance within a compound, the entire gross weight of the compound determines the length of the sentence. See Sentencing Guidelines, page 2.39, title 21 U.S.C. Sec. U.S.C., Sec. 960 (b) (1) (A). It is clear in this case, that the only amount that was intended to be distributed was the exact scientific amount for which the prescription was written. To

infer otherwise goes against the scientific principles that doctors and pharmacologists use in prescribing all medicines which require prescriptions. Any policy justifications for sentencing based on the overall amount of street drugs is absent when sentencing guidelines are calculated for the sale of pharmaceutical drugs. Pharmaceutical drugs are highly regulated by both federal statute and regulation.² In the case of pharmaceutical drugs, there is no public policy reason that outweighs a Defendant's Due Process and Equal Protection rights.

To further substantiate that pharmaceutical drugs should be treated in a separate category, and thus not subject

2) See 21 U.S.C. 825, (labeling a package); 21 U.S.C. 826 (production quotas and regulations); 21 U.S.C. 823 (registration of manufacturers); 21 C.F.R. 1301 (registration of manufacturers); 21 C.F.R. 1302 et. seq. (labeling and packaging).

to the Drug Equivalency Table, Congress recognized that pharmaceutical drugs are highly monitored by the previously noted federal statutes and regulations. Title 21, Sec. 829, of the United States Code is entitled "Prescriptions," and focuses on the illegal distribution through use of prescriptive controlled substances. Within Sections 21, Sec. 841 and 960, the penalties for prescription drugs are not identified and categorized. This oversight results in fundamental unfairness and a system that is imbalanced. Without a specified category for addressing controlled substances sold through use of a prescription, misinterpretation and confusion is created. This results in a violation of an individual's Fifth Amendment Due Process and Equal Protection rights.

The errors in the instant case have been further compounded by the Sentencing

Commission creation of a system by which all controlled substances, with or without any legitimate medicinal value, are equated to heroin, a drug with no legitimate recognized medical value. (The Guidelines, age 2.38). The Commission's decision to measure various drugs against heroin was an arbitrary and capricious one. There is no rational basis to use this system in the case of prescriptive controlled substances. A more rational system for measuring equivalencies would recognize and differentiate between drugs which have a legitimate use and those which do not. Dr. Bayerle contends that his Due Process and Equal Protection rights were violated by an arbitrary Criminal Justice System that equates prescription drugs to heroin. The Sentencing Commission's failure to consider and make a distinction between the format in which a controlled substance is sold is

against public policy.

The question presented is clearly of the utmost importance in light of the Fourth Circuit's decision and the required use of the Federal Sentencing Guidelines.

CONCLUSION

The calculation of gross weight in the manner of the present case violates the Constitutional protections established for Dr. Bayerle and the general public in the Fifth Amendment to the United State Constitution. The issue presented in this case is a novel one that deserves this Court's review. The Sentencing Guidelines, although deemed constitutional as a whole, have yet to be evaluated in the use of prescriptive controlled substances. It serves no purpose to utilize a system that is arbitrary and capricious in cases involving these types of controlled substances. Congress

recognized the differences between street and prescription controlled substances by separating them into different offenses. The Sentencing Guidelines should also reflect this differentiation. The transformation of prescriptive controlled substances into a heroin equivalency lacks any rational basis. In upholding the District Court's use of gross weight and the Drug Equivalency Tables to determine the length of incarceration, the Fourth Circuit found that there was no distinction between prescriptive and street controlled substances, and that transformation of prescriptive controlled substances into a heroin equivalency is within Congressional intent. The question should be settled by this Court.

The Court should issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit so that this Court may determine a fair, accurate

and reliable method to be used in
sentencings involving prescription drugs.

Respectfully submitted,

Domenic R. Iamele
Levy & Iamele
Suite 702
114 E. Lexington Street
Baltimore, Maryland 21202
752-6160
Counsel for Petitioner

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

RAYMOND FRANCIS BAYERLE,
PETITIONER
v.
UNITED STATES OF AMERICA,
RESPONDENT

APPENDIX

TABLE OF CONTENTS

United States v. Bayerle, 898 F.2d (1990)	App. 1
Judgment and Commitment Order..	App. 19
21 U.S.C. Section 829.....	App. 27
21 U.S.C. Section 841.....	App. 30

21 U.S.C. Section 960.....	App. 50
21 U.S.C. Section 991.....	App. 51
Federal Sentencing Guidelines..	App. 54
Fifth Amendment of the United States Constitution.....	App. 86

898 Fed.2d 28
UNITED STATES of America,
Plaintiff, Appellee,

v.

Raymond Francis BAYERLE,
Defendant-Appellant.

No. 89-5166.

United States Court of Appeals,
Fourth Circuit.

Argued Dec. 7, 1989.

Decided March 9, 1990.

Defendant was convicted in the United States District Court for the District of Maryland, John R. Hargrove, J., of drug offenses, and he appealed. The Court of Appeals, Butzner, Senior Circuit Judge, held that: (1) court could not review trial court's refusal to depart downward from the guidelines, and (2) sentencing defendant based on gross weight of pharmacological drugs which he prescribed did not violate due process.

Affirmed in part and dismissed in part.

Domenic Ralph Iamele, Levy & Iamele,
argued, Baltimore, Md., for
defendant-appellant.

Miriam Krinsky, argued, Breckinridge
L. Willcox, U.S. Atty., Gregory Welsh,
Asst. U.S. Atty., on brief, Baltimore,
Md., for plaintiff-appellee.

Before RUSSELL and WILKINS, Circuit
Judges, and BUTZNER, Senior Circuit
Judge.

BUTZNER, Senior Circuit Judge:

Dr. Raymond Francis Bayerle pleaded guilty to a variety of federal charges, including conspiracy to distribute dilaudid (hydromorphone) and dolaphine (methadone) in violation of 21 U.S.C. Section 846. On appeal he challenges the sentence imposed for the drug offenses on several grounds. We conclude that the district court's refusal to depart downward is not appealable, and we see no merit in Bayerle's other assignments of
App. 2

error. Accordingly, we dismiss part of the appeal and otherwise affirm the district court judgment.

I

Bayerle was a licensed physician in Maryland when, according to the stipulated facts in Bayerle's plea agreement, he sold completed prescriptions for dilaudid and dolaphine. The purchasers were coconspirators who used the prescriptions to buy drugs for resale. Bayerle illegally prescribed over 37,000 tablets in this manner from January 1987 to September 1988. For these services he received first \$1 and later \$2 per tablet.

[1] Because Bayerle's offenses continued until after November 1, 1987, his sentence is subject to the guidelines promulgated by the United States Sentencing Commission. The guideline range for Bayerle's offenses is 121 to 137 months.

Bayerle contends that the district court should have departed downward from the guideline range. He relies on U.S.C. Section 3553(b) and two policy statements in the Guidelines Manual as the basis for his argument. Section 3553(b) directs a sentencing court to depart from the guideline range when the court "finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission... that should result in a sentence different from that described." Section 5K2.0, a policy statement in the Guidelines Manual, introduces in turn a nonexhaustive list of factors which "may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing judge." One such factor is the "diminished capacity" of the defendant, defined by Section 5K2.13.

According to Bayerle, the sentencing court should have imposed a sentence below the guideline range because he presented evidence of emotional illness, which he claims contributed to his illegal behavior and hence diminished his capacity within the meaning of Section 5K2.13. The district court's error under this view amounts to one of fact. Bayerle reads Section 3553(b), in conjunction with Section 5K2.13, to require a downward departure whenever there is sufficient evidence of diminished capacity. The district court, however, concluded that "diminished capacity... is not, in my opinion, a very good reason to dispense drugs. I think that you had the capacity to understand what you were doing. That's what all the doctors said, what all the psychiatrists said..." The district court based its finding about Bayerle's capacity on the report of an examination conducted

at a federal correctional institution. The report concluded that "[a]t the time of the offense Dr. Bayerle was able to appreciate the nature and quality of his actions." The court imposed a sentence at the lower end of the guideline range, 121 months.

The government argues that a court's refusal to depart downward from the guideline range is not appealable and that, alternatively, the court did not err in refusing to depart.*

II

Recently, seven circuits have decided that refusals to depart downward from the

*Our court, in an earlier opinion, reviewed a decision not to depart downward without commenting on whether a defendant could appeal a refusal to depart. **United States v. Sheffer**, No. 89-5573, slip op. at 8, 896 F.2d 842, 845 (4th Cir. Feb. 20, 1990). The issue was not directly presented in that case; consequently, **Sheffer** does not control the discussion here. See also **United States v. McCrary**, 887 F.2d 485, 488-89 (4th Cir.1989).

guideline range are not appealable.

United States v. Tucker, 892 F.2d 8 (1st Cir. 1989); **United States v. Colon**, 884 F.2d 1550 (2d Cir. 1989); **United States v. Denardi**, 892 F.2d 269 (3d Cir. 1989); **United States v. Buenrostro**, 868 F.2d 135 (5th Cir. 1989); **United States v. Draper**, 888 F.2d 1100 (6th Cir. 1989); **United States v. Franz**, 886 F.2d 973 (7th Cir. 1989); **United States v. Fossett**, 881 F.2d 976 (11th Cir. 1989). Some of the opinions reason that the courts of appeals lack jurisdiction to entertain appeals from refusals to depart. Others rest this decision on the statutory limitations of a defendant's right to appeal. Compare **Franz**, 886 F.2d at 981 n. 8; **Denardi**, 892 F.2d at 272 (no jurisdictions to review) with **Fossett**, 881 F.2d at 978-79; **Colon**, 884 F.2d at 1552-56 (Statute confers no right to appeal).

[2,3] Title 28, Section 1291 of the

United States Code confers jurisdiction on us of appeals from final orders of district courts. A sentence is a final order. We therefore have jurisdiction to consider the district court's sentencing order in light of the statute governing a defendant's appeal. Cf. *Bell v. Hood*, 327 U.S. 678, 680-83, 66 S.Ct. 773, 774-75, 90 L.Ed. 939 (1946). In any event, the reasons for denying review are essentially the same under either jurisdictional or statutory theories. Because we are persuaded by the sound precedent that denies review of refusals to depart downward, we find it necessary to reiterate in detail the reasons our colleagues in other courts of appeals have marshalled to reach this result.

Title 18, Section 3742 of the United States Code gives specific circumstances under which a defendant may appeal a sentence:

(a) Appeal by a defendant-A

defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence-

- (1) was imposed in violation of law;
- (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
- (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under Section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or
- (4) was imposed for an offense for which there is no sentencing guideline and

is plainly unreasonable.

In a recent case which considers a district court's refusal to depart downward, Judge Seitz succinctly analyzed Section 3742:

We look in vain for language governing a defendant's right to appeal the denial of relief under the foregoing circumstances. The portion of the statute providing for appeals by a defendant (18 U.S.C., Section 3742) simply does not authorize such an appeal. Certainly Section 3742(a)(2) (incorrect application of guidelines) does not apply in the present context. Otherwise, as the government suggests, a discretionary refusal to go below the guidelines would seem also to apply to situations in which a defendant challenged an enhanced departure. Such a result would render Section 3742(a)(3) largely superfluous.

Finally, although not relied on by

the defendant, we do not believe that 18 U.S.C., Section 3553(b) (permitting a deviation from the guidelines under certain circumstances), when read with Section 3553(a) (factors to be considered in imposing a sentence) converts an unappealable exercise of discretion into an error of law that may be reviewed under Section 3742(a)(1) in some amorphous circumstances. If such a result is desirable, it is for Congress to say so.

We conclude that Section 3742(a) does not authorize an appeal in the present circumstances.

Denardi, 892 F.2d at 272 (footnote omitted).

III

[4] There is an exception to the precept that a defendant cannot appeal a refusal to depart downward. Section 3742(a)(1) provides for review of a sentence "imposed in violation of law." A

defendant can appeal if this very narrow situation arises. **Franz**, 886 F.2d at 980; **Fossett**, 881 F.2d at 979; **Buenrostro**, 868 F.2d at 139. Thus, if the refusal to depart downward were based on the district court's mistaken view that it lacked the authority to depart, the defendant could appeal. See. U.S.S.G. Ch. 5, Pt. K (listing some factors justifying departure pursuant to 18 U.S.C. Section 3553(b)); **Colon**, 884 F.2d at 1553; **Fossett**, 881 F.2d at 979; **United States v. Russel**, 870 F.2d 18 (1st Cir.1989).

Bayerle contends that he may appeal because the court mistakenly believed it was without authority to depart. The record, however, refutes this contention. The court knew that it could depart. It refused it because it concluded that the evidence did not justify departure.

IV

[5] Bayerle also argues that his
App. 12

sentence is unconstitutional. He contends that sentencing him based on the gross weight of the pharmacological drugs he prescribed violates his due process rights. The presentence report calculated the combined weight of the dilaudid and dolaphine and used the Drug Equivalency Tables set out in the commentary to Section 2D1.1 to convert the total to a heroin equivalency. The report established a base offense level from the heroin equivalency in accordance with the Drug Quantity Table in Section 2D1.1(c). Use of the pills' gross weight to figure Bayerle's base offense level amounts to a due process violation, we are told, because the potency of these drugs varies both with their form and the dosage of a given pill. Gross weight does not account for the difference between a 4mg. and an 8 mg. dilaudid, for example, because the gross weight remains the same even though

one pill has twice the potency of the other. Similarly, the equivalency table makes no adjustment for the increased potency of the drug in liquid as compared to the pill form.

We have confronted and rejected this argument before in a slightly different context. In **United States v. Whitehead**, 849 F.2d 849 (4th Cir.1988), the Defendant challenged the classification for sentencing purposes of cocaine "by [the] quantity to [the] contraband without regard to its purity." 849 F.2d at 859. The statute in question there, 21 U.S.C. Section 841(b)(1), provided that so long as a cocaine mixture contained a "detectable amount" of cocaine, the gross weight of the mixture would be the basis for sentencing. We upheld the statute, finding the gross weight scheme rationally related to the legislative goal behind the law. 849 F.2d at 859-60; accord **United**

States v. Holmes, 838 F.2d 1175, 1177-78

(11th Cir. 1988)

[6] The equivalency tables complained of here are simply an extension of the scheme we upheld in **Whitehead**. The commentary to Section 2D1.1 states that the Commission "has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. Section 841(b)(1))" in the Drug Equivalency Tables in order to provide "conversion factors" for a host of illegal substances not explicitly treated in the statute.

U.S.S.G. Section 2D1.1, comment. (n. 10). A note to Section 2D1.1(c) adds that "the weight of a controlled substance... refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance" (emphasis added). Although the note refers to the Drug Quantity Table in 2D1.1(c), we read it to apply as well to the Drug

States v. Holmes, 838 F.2d 1175, 1177-78
(11th Cir. 1988)

[6] The equivalency tables complained of here are simply an extension of the scheme we upheld in **Whitehead**. The commentary to Section 2D1.1 states that the Commission "has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. Section 841(b)(1))" in the Drug Equivalency Tables in order to provide "conversion factors" for a host of illegal substances not explicitly treated in the statute.

U.S.S.G. Section 2D1.1, comment. (n. 10). A note to Section 2D1.1(c) adds that "the weight of a controlled substance... refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance" (emphasis added). Although the note refers to the Drug Quantity Table in 2D1.1(c), we read it to apply as well to the Drug

Equivalency Tables which follow.

Consequently, the equivalency tables are premised upon the same "detectable amount" standard approved in **Whitehead**. Just as we upheld the quantity-based approach in **Whitehead** for 21 U.S.C. Section 841(b)(1), we uphold it in the Drug Equivalency Tables.

[7] Our conclusion is not swayed by Bayerle's observation that the guidelines permit consideration of drug purity in determining a defendant's role in a drug offense. Commentary to Section 2D1.1 explains that "[t]rafficking in controlled substances...of unusually high purity may warrant an upward departure [from the guideline range]... because [the purity may be] probative of the defendant's role or position in the chain of distribution." U.S.S.G. Section 2D1.1, comment. (n. 9). Although Bayerle finds it contradictory for a sentencing court to consider drug

purity there and not in the equivalency tables, we find no such difficulty. The commentary merely identifies a situation which might warrant an upward departure. It is entirely consistent with the equivalency tables. Cf. **United States v. Baker**, 883 F.2d 13, 15 (5th Cir. 1989).

v

We dismiss Bayerle's complaint that the district court erred by not departing downward. We have no occasion to review this assignment or error on its merits because it is not appealable. In all other respects we affirm the judgment of the district court.

App. 18

UNITED STATES DISTRICT COURT

District of Maryland

UNITED STATES OF AMERICA

v.

RAYMOND FRANCIS BAYERLE

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

Case Number HAR-88-0336

Gregory Welsh
Attorney for the United States

Domenic R. Iamele (RET)
Defendant's Attorney

THE DEFENDANT:

x Pleaded guilty to count(s) 1 and 23.
Accordingly, the Defendant is adjudged
guilty of such count(s),
which involve the following offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>
21:846	Conspire to distr. & dispsne, and to possess w/ intent to distr. Sch.II NCS, Dilaudid & Dolophine.
26:5861(e)	Transfer firearms.

Count No(s).

1

23

The defendant is sentenced as provided in

pages 2 through 4 of this Judgment.
The sentence is imposed pursuant to the
Sentencing Reform Act of 1984.

Count(s) 2 thru 22 and 24 and
25 and are dismissed on the
motion of the United States.

It is ordered that the defendant
shall pay to the United States
a special assessment of \$100.00.

It is further ordered that the
defendant shall notify the United
States Attorney for this district within
30 days of any change of
residence or mailing address until
all fines, restitution, costs,
and special assessments imposed by
this Judgment are fully paid.

Defendant's Soc. Sec. No.:

June 9, 1989
date of imposition of Sentence

Defendant's mailing address:
4601 E. Monument Street
Baltimore, Maryland

Signature of Judicial Officer
JOHN R. HARGROVE
Name & Title of Judicial Officer

Date

Judgment-Page 2 of 4

Defendant: **RAYMOND F. BAYERLE**
Case Number: **HAR-88-0336**

IMPRISONMENT

The Defendant is hereby committed
to the custody of the United
States Bureau of Prisons to be imprisoned
for a term of 121 months.

Judgment-Page 3 of 4

Defendant: **RAYMOND F. BAYERLE**

Case Number: **HAR-88-0336**

SUPERVISED RELEASE

Upon release from imprisonment,
the Defendant shall be on supervised
release for a term of 3 years.

While on supervised release, the
Defendant shall not commit another
Federal, state or local crime and
shall comply with the standard conditions
that have been adopted by this court (set
forth on the following page.) If this
judgment imposes a restitution obligation,
it shall be a condition of supervised
release that the defendant pay any such
restitution that remains unpaid at the
commencement of the term of supervised
release.

Judgment-Page 4 of 4

Defendant: RAYMOND F. BAYERLE

Case Number: HAR-88-0336

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this judgement:

- 1) The defendant shall not commit another Federal, state or local crime;
- 2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation

officer;

5) the defendant shall support his or her dependants and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties

of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

**Title 21 U.S.C.A., Section 829, Drug Abuse
Prevention and Control**

(a) Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule II, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act. may be dispensed without the written prescription of a practitioner, except that in emergency situations, as prescribed by the Secretary of regulation after consultation with the Attorney General, such drug may be dispensed upon oral prescription in accordance with section 503(b) of that Act. Prescriptions shall be retained in conformity with the requirements of section 827 of this title. No prescription for a controlled substance in schedule II may be refilled.

Schedule II and IV substances

(b) Except when dispensed directly

by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule III or IV, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act, may be dispensed without a written or oral prescription in conformity with section 503(b) of that Act. Such prescription may not be filled or refilled more than six months after the date thereof or be refilled more than five times after the date of the prescription unless renewed by the practitioner.

Schedule V substances

(c) No controlled substance in Schedule V which is a drug may be distributed or dispensed other than for a medical purpose.

Non-prescription drugs with abuse potential

(d) Whenever it appears to the

Attorney General that a drug not considered to be a prescription drug under the Federal Food, Drug, and Cosmetic Act should be so considered because of its abuse potential, he shall so advise the Secretary and furnish to him all available data relevant thereto (Pub.L. 91-513, Title II, § 309, Oct. 27, 1970, 84 Stat. 1260.)

**Title 21 U.S.C.A., Section 841, Prohibited
acts A**

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845, 845a, or 845b of this title, any person who violated subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a violation of subsection (a) of this section

involving--

- (i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;
- (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--
 - (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
 - (II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
 - (III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
 - (IV) any compound mixture, or preparation which contains any quantity of any of the substance¹ referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a

mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such persons shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after

a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$8,000,000 if the defendant is an individual or \$20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 845, 845a, or 845b of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence.

For purposes of this subparagraph, the term "felony drug offense" means an offense that is a felony under any provision of this subchapter or any other Federal law that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances or a felony under any law of a State or a foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or

suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment therein.

(B) In the case of a violation of subsection (a) of this section involving-

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives,

their salts, isomers, and salts of isomers; or

(IV) any compound mixture, or preparation which contains any quantity of any of the substance¹ referred to in subclauses (1) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4piperidinyl]

propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such persons shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life,

a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$2,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed

the greater of twice that authorized in accordance with the provisions of Title 18, or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II except as

provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior conviction for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have

become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$2,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or

serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$250,000 if the defendant is an individual or \$1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior conviction of him for an offense punishable under this paragraph, or for a felony under any other

provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such a term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in

addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$250,000 if the defendant is an individual or \$1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not

more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provision of Title 18, or \$100,000 if the defendant is an

individual or \$250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this chapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$200,000 if the defendant is an individual or \$500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph

(1) (D) of this subsection any person who violated subsection (a) of this section

by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violated subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed--

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) \$500,000 if the defendant is an individual; or

(D) \$1,000,000 if the defendant is other than an individual;

or both

(6) Any person who violated

subsection (a) of this section, or attempts to do so, and knowingly or intentionally used a poison, chemical, or other hazardous substance on Federal land, and, by such use--

(A) creates a serious hazard to humans, wildlife, or domestic animals.

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water, shall be fined in accordance with Title 18, or imprisoned not more than five years, or both.

Title 21 U.S.C. Section 841

Prohibited acts A

(a) except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense or possess with intent to manufacture, distribute, or dispense a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Title 21 U.S.C., Section 960(b)(1)(A)

(b) Penalties

(1) In the case of a violation of subsection (a) of this section involving--

(A) 1 kilogram or more of a mixture of substance containing a detectable amount of heroin;

(B) 5 kilograms or more of

a mixture or substance containing a detectable amount of--

(i) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(ii) cocaine, its salts, optival and geometric isomers, and salts or isomers;

(iii) ecgonine, its derivatives, their salts, isomers, and salts of isomers;

(iv) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in clauses (i) through (iii).

Title 28 U.S.C., Section 991

**United States Sentencing Commission;
establishment and purposes**

(a) There is established as an independent commission in the judicial branch

of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, as the Chairman. At least three of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party. The Attorney General, or his designee, shall be an ex officio, nonvoting member of the Commission. The Chairman and members of the

Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for any other good cause shown.

(b) The purposes of the United States Sentencing Commission are to--

(1) establish sentencing policies and practices of the Federal criminal justice system that--

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code [18 USCS Section 3553(a)(2)];

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not

taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

FEDERAL SENTENCING GUIDELINES

Part A-Introduction, p.1.12

5. A Concluding Note

The Commission emphasizes that its approach in this initial set of guidelines is one of caution. It has examined the many hundreds of criminal statutes in the United States Code. It has begun with those that are the basis for a significant number of prosecutions. It has sought to

place them in a rational order. It has developed additional distinctions relevant to the application of these provisions, and it has applied sentencing ranges to each resulting category. In doing so, it has relied upon estimates of existing sentencing practices as revealed by its own statistical analyses, based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from existing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with these guidelines will lead to additional information and

provide a firm empirical basis for revision.

Finally, the guidelines will apply to approximately 90 percent of all cases in the federal courts. Because of time constraints and the nonexistence of statistical information, some offenses that occur infrequently are not considered in this initial set of guidelines. They will, however, be addressed in the near future. Their exclusion from this initial submission does not reflect any judgment about their seriousness. The Commission has also deferred promulgation of guidelines pertaining to fines, probation and other sanctions for organizational defendants, with the exception antitrust violations. The Commission also expects to address this area in the near future.

Part D-Offenses Involving Drugs, p. 2.37

1. Unlawful Manufacturing, Importing, Exporting, Trafficking, Or

Possession; Continuing Criminal Enterprise

Section 2D1.1 Unlawful Manufacturing,
Importing, Exporting or
Trafficking (Including
Possession with Intent
to Commit these Offenses)

(a) Base Offense Level:

- (1) 43, for an offense that results in death or serious bodily injury with a prior conviction for a similar drug offense; or
- (2) 38, for an offense that results in death or serious bodily injury and involved controlled substances (except Schedule III, IV and V controlled substances and less than: (A) fifty kilograms of marihuana, (B) ten kilograms of hashish, and (C) one kilogram of hashish

oil); or

(3) For any other offense, the base offense level is the level specified in the Drug Quantity Table below.

(b) Specific Offense Characteristic

(1) If a firearm or other dangerous weapon was possessed during commission of the offense, increase by 2 levels.

Part D-Drug Quantity Table, Commentary,
and Drug Equivalency Table, p. 2.38-2.42

DRUG QUANTITY TABLE

<u>Controlled Substance</u>	<u>Base Offense Level</u>
<u>and Quantity</u>	

10 KG Heroin or equivalent Schedule I or II

Level 36

Opiates, 50 KG Cocaine or

equivalent Schedule I or II Stimulants, 500 G

Cocaine Base, 10 KG PCP or

1 KG Pure PCP, 100 G LSD or
equivalent Schedule I or II
Hallucinogens, 4 KG Fentanyl
or 1 KG Fentanyl Analogue,
10,000 KG Marihuana, 100,000
Marihuana Plants, 2000 KG
Hashish, 200 KG Hashish Oil
(or more of any of the above) Level 34
3-9.9 KG Heroin or equivalent Level 34
Schedule I or II Opiates, "
15-49.9 KG Cocaine or equiva-
lent Schedule I or II Stimu-
lants, 150-499 G Cocaine Base,
3-9.9 KG PCP or 300-999 G
Pure PCP, 30-99 G LSD or
equivalent Schedule I or II
Hallucinogens, 1.2-3.9 KG
Fentanyl or 300-999 G Fentanyl
Analogue, 3000-9999 KG Mari-
huana 30,000-99,999 Marihuana
Plants, 600-1999 KG Hashish,
60-199 KG Hashish Oil

1-2.9 KG Heroin or equivalent Level 32**

Schedule I or II Opiates, 5-

14.9 KG Cocaine or equivalent

Schedule I or II Stimulants,

50-149 G Cocaine Base, 1-2.9

KG PCP or 100-299 G Pure PCP,

10-29 G LSD or equivalent

Schedule I or II Hallucinogens,

4-1.1 KG Fentanyl or 100-299 G

Fentanyl Analogue, 1000-2999 KG

Marihuana, 10,000-29,999 Mari-

huana Plants, 200-599 KG Hashish

20-59.9 KG Hashish Oil

700-999 G Heroin or equivalent Level 30

Schedule I or II Stimulants, 35-49

G Cocaine Base, 700-999 G PCP or

70-99 G Pure PCP, 7-9.9 G LSD or

equivalent Schedule I or II Hallu-

cinogens, 280-399 G Fentanyl or

70-99 G Fentanyl Analogue, 700-999

KG Marihuana, 7000-9990 Marihuana

Plants, 140-199 KG Hashish, 14-19.9

KG Hashish Oil

400-699 G Heroin or equivalent Level 28

Schedule I or II Opiates, 2-3.4

KG Cocaine or equivalent Schedule I or II Stimulants, 20-34.9

G Cocaine Base, 400-699 G PCP

or 40-69 G Pure PCP, 4-6.9 G

LSD or equivalent Schedule I

or II Hallucinogens, 160-279

G Fentanyl or 40-69 G Fentanyl

Analogue, 400-699 KG Marihuana,

4000-6999 Marihuana Plants,

80-139 KG Hashish, 8.0-13.9 KG

Hashish Oil

100-399 G Heroin or equivalent Level 26**

Schedule I or II Opiates, 5-1.9

KG Cocaine or equivalent Schedule I or II Stimulants, 5-19 G

Cocaine Base, 100-399 G PCP or

10-39 G Pure PCP, 1-3.9 G LSD

or equivalent Schedule I or II

Hallucinogens, 40-159 G Fentanyl

or 10-39 G Fentanyl Analogue,
100-399 KG Marihuana, 1000-
3999 Marihuana Plants, 20-79
KG Hashish, 2.0-7.9 KG Hashish

Oil

80-99 Heroin or equivalent Level 24

Schedule I or II Opiates,
400-499 G Cocaine or equiva-
lent Schedule I or II Stimu-
lants, 4-4.9 G Cocaine Base,
80-99 G PCP or 809.9 G Pure
PCP, 800-999 MG LSD or equiva-
lent Schedule I or II Hallucino-
gens, 32-39 G Fentanyl or 8.9-9
G Fentanyl Analogue, 80-99 KG

Marihuana, 800-999 Marihuana
Plants, 16-19.9 KG Hashish,

1.6-1.9 KG Hashish Oil

60-79 G Heroin or equivalent Level 22

Schedule I or II Opiates,
300-399 G Cocaine or equiva-
lent Schedule I or II

Stimulants, 3-3.9 G. Cocaine
Base, 60-79 G PCP or 6-7.9 G
Pure PCP, 600-799 MG LSD or
equivalent Schedule I or II
Hallucinogens, 24-31.9 G Fen-
tanyl or 6-7.9 G Fentanyl
Analogue, 60-79 KG Marihuana,
600-799 Marihuana Plants,
12-15.9 KG Hashish, 1.2-1.5
KG Hashish Oil
40-59 G Heroin or equivalent Level 20
Opiates, 200-299 G Cocaine
or equivalent Schedule I or
II Stimulants, 2-2.9 G Cocaine
Base, 40-59 G PCP or 4-5.9 G
Pure PCP, 400-599 MG LSD or
equivalent Schedule I or II
Hallucinogens, 16-23.9 G
Fentanyl or 4-5.9 G Fentanyl
Analogue, 40-59 KG Marihuana,
400-599 Marihuana Plants, 8-11.9
KG Hashish, .8-1.1 KG Hashish Oil,

20 KG+ Schedule III or other
Schedule I or II controlled substances

20-39 G Heroin or equivalent Level 18
Schedule I or II Opiates, 100-
199 G Cocaine or equivalent
Schedule I or II Stimulants,
1-1.9 G Cocaine Base, 20-39 G
PCP or 2-3.9 G Pure PCP, 200-399
MG LSD or equivalent Schedule I
or II Hallucinogens, 8-15.9 G
Fentanyl or 2-3.9 G Fentanyl
Analogue, 20-39 KG Marihuana,
200-399 Marihuana Plants, 5-7.9
KG Hashish, 500-799 G Hashish Oil,
10-19 KG Schedule III or other
Schedule I or II controlled substances

10-19 G Heroin or equivalent Level 16
Schedule I or II Opiates, 50-99
G Cocaine or equivalent Sched-
ule I or II Stimulants, 500-999

MG Cocaine Base, 10-19.9 G PCP
or 1-1.9 G Pure PCP, 100-199
MG LSD or equivalent Schedule
I or II Hallucinogens, 4-7.9
G Fentanyl or 1-1.9 G Fentanyl
Analogue, 10-19 KG Marihuana,
100-199 Marihuana Plants, 24.9
KG Hashish, 200-499 G Hashish Oil,
5-9.9 KG Schedule III or other
Schedule I or II controlled sub-
stances

5-9.9 G Heroin or equivalent Level 14
Schedule I or II Opiates,
25-49 G Cocaine or equivalent
Schedule I or II Stimulants,
250-499 MG Cocaine Base, 5-9.9
G PCP or 500-999 MG Pure PCP,
50-99 MG LSD or equivalent
Schedule I or II Hallucinogens,
2-3.9 G Fentanyl or .5-.9 G
Fentanyl Analogue, 5-9.9 KG
Marihuana, 50-99 Marihuana Plants,

1-1.9 KG Hashish, 100-199 G
Hashish Oil, 2.5-4.9 KG Sched-
ule III or other Schedule I or
II controlled substances

Less than the following: Level 12
5 G Heroin or equivalent
Schedule I or II Opiates, 25
G Cocaine or equivalent Sched-
ule I or II Stimulants, 250 MG
Cocaine Base, 5 G PCP or 500
MG Pure PCP, 50 MG LSD or
equivalent Schedule I or II
Hallucinogens, 2 G Fentanyl
or 500 MG Fentanyl Analogue;
2.5-4.9 KG Marihuana, 25-49
Marihuana Plants, 500-999 G
Hashish, 50-99 G Hashish Oil,
1.25-2.4 KG Schedule III or
other Schedule I or II con-
trolled substances, 20 KG+
Schedule IV

1-24 KG Marihuana, 10-24 Mari- Level 10
huana Plants, 200-499 G Hashish
Oil, 50-1.24 KG Schedule III or
other Schedule I or II con-
trolled substances 8-19 KG
Schedule IV

250-999 G Marihuana Plants, Level 8
50-199 G Hashish, 10-19 G
Hashish Oil, 125-449 G Sched-
ule III or other Schedule I
or II controlled substances,
2 KG Schedule IV, 20 KG Sched-
ule V

* The scale amounts for all controlled substances refer to the total weight of the controlled substances. Consistent with the provisions of the Anti-Drug Abuse Act, if any mixture of a compound contains any detectable amount of a controlled dangerous substance, the entire amount of the

mixture or compound shall be considered in measuring the quantity.

If a mixture or compound contains a detectable amount of more than one controlled substance, the most serious controlled substance shall determine the categorization of the entire quantity.

- ** Statute specifies a mandatory minimum sentence.

COMMENTARY

Statutory Provisions: 21 U.S.C. Section 841, 960.

Application Notes:

1. "Similar drug offense" as used in Section 2D1.1(a)(1) means a prior conviction as described in 21 U.S.C. Section 841(b) or 962(b).
2. The statute and guideline also apply to "counterfeit" substances, which are defined in 21 U.S.C. Section 802 to mean controlled substances that

are freely labeled so as to appear to have been legitimately manufactured or distributed.

3. Definitions of "firearm" and "dangerous weapon" are found in the Commentary to Section 1B1.1 (Application Instructions). The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses that referenced Section 2D1.1, i.e., Section 2D1.2-2D1.4. The adjustment is to be applied even if several

counts are involved and the weapon was present in any of them.

4. Distribution of "a small amount of marihuana for no remuneration", 21 U.S.C. Section 841(b)(4), is treated as simple possession, to which Section 2D2.1 applies.
5. Any reference to a particular controlled substance in these guidelines include all salts, isomers, and all salts of isomers. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed.
6. Where there are multiple transactions or multiple drug types, the quantities of drugs are to be added. Tables for making the necessary conversions are provided below.
7. Where a mandatory (statutory) minimum sentence applies, this mandatory

minimum sentence may be "waived" and a lower sentence imposed (including a sentence below the applicable guideline range), as provided in 28 U.S.C. Section 994(n), by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense". See Section 5K1.1 (Substantial Assistance to Authorities).

8. A Defendant who used special skills in the commission of the offense may be subject to an enhancement under Section 3B1/3 (Abuse of Position of Trusts or Use of Special Skill). Certain professionals often occupy essential positions in drug trafficking schemes. These professionals include doctors, pilots, boat captains, financiers, bankers, attorneys,

chemists, accountants, and others whose special skill, trade, profession, or position may be used to significantly facilitate the commission of a drug offense.

9. Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure. The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the

source of the drugs. As large quantities are normally associated with high purities, this factor is particularly relevant where similar quantities are involved. Congress provided an exception to purity considerations in the case of phencyclidine (PCP). 21 U.S.C. Section 841 (b)(1)(A). The legislation designates amounts of pure PCP and mixtures in establishing mandatory sentence. The first row of the table illustrates this distinction as one kilogram of PCP OR 100 grams of pure PCP. Allowance for higher sentences based on purity is not appropriate for PCP.

10. The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. Section 841(b)(1)), as the primary basis for the guideline sentences. The

statute, however, provides direction only for the more common controlled substances, i.e., heroin, cocaine, PCP, LSD and marihuana. The Drug Equivalency Tables set forth below provide conversion factors for other substances, which the Drug Quantity Table refers to as "equivalents" of these drugs. For example, one gram of a substance containing methamphetamine, a Schedule I stimulant, is to be treated as the equivalent of two grams of a substance containing cocaine in applying the Drug Quantity Table.

The Drug Equivalency Tables also provide a means for combining differing controlled substances to obtain a single offense level. If all the drugs are "equivalents" of the same drug, e.g., stimulants that are grouped with cocaine, convert them to

that drug. In other cases, convert each of the drugs to either the heroin or marihuana equivalents, add the quantities, and look up the total in the Drug Quantity Table to obtain the combined offense level. Use the marihuana equivalents when the only substances involved are "Schedule I Marihuana," "Section III Substances," "Section IV Substances," Schedule V Substances" or "Other Schedule I or II Substances." Otherwise, use the heroin equivalents.

Note: Because of the statutory equivalences, the ratios in the Drug Equivalency Tables do not necessarily reflect dosages based on pharmacological equivalents.

Examples:

- a. The defendant is convicted of selling seventy grams of a substance

containing PCP (Level 22) and 250 milligrams of a substance containing LSD (Level 18). Both PCP and LSD are grouped together in the Drug Equivalency Tables under the heading "LSD, PCP and Other Schedule I and II Hallucinogens," which provide PCP equivalencies. The 250 milligrams of LSD is equivalent to twenty-five grams of PCP. The total is therefore ninety-five grams of PCP, for which the Drug Quantity Table provides an offense level of 24.

b. The defendant is convicted of selling 500 grams of marihuana (Level 8) and five kilograms of diazepam (Level 8). The diazepam, a Schedule IV drug, is equivalent to 625 grams of marihuana. The total, 1.125 kilograms of marihuana, has an offense level of 10 in the Drug

Quantity Table.

c. The defendant is convicted of selling eighty grams of cocaine (Level 16) and five kilograms of marihuana (Level 14). The cocaine is equivalent to sixteen grams of heroin; the marihuana, to five grams of heroin. The total equivalent is twenty-one grams of heroin, which has an offense level of 18 in the Drug Quantity Table.

DRUG EQUIVALENCY TABLES

Schedule I or II Opiates

1 gm of Alpha-

Methylfentanyl = 100 gm of heroin

1 gm of Dextro-

moramine = 0.67 gm of heroin

1 gm of Dipipanone = 0.35 gm of heroin

1 gm of 3-Methyl-

fentanyl = 125 gm of heroin

1 gm of 1-Methyl-4-phenyl-4

propionoxypiperidine/MPPP =

0.7 gm of heroin

1 gm of 1-(2 Phenylethyl)

-4-phenyl-4-

acetyloxypiperidine/

PEPAP = 0.7 gm of heroin

1 gm of Alphaprodine = 0.1 gm of heroin

1 gm of Fentanyl (N-phenyl-

N-[1-(2 phenylethyl)-4-

piperidinyl] Propana-

mide) = 31.25 gm of heroin

1 gm of Hydromorphone/

Dihydromorphinone = 2.5 gm of heroin

1 gm of Levorphanol = 1.5 gm of heroin

1 gm of Meperidine/

Pethidine = 0.05 gm of heroin

1 gm of Methadone = 0.5 gm of heroin

1 gm of 6-Monoacetyl-

morphine = 1 gm of heroin

1 gm of Morphine = 0.5 gm of heroin

1 gm of Oxycodone = 0.5 gm of heroin

1 gm of Oxymorphone = 5 gm of heroin

1 gm of Racemorphan = 0.8 gm of heroin

1 gm of Codeine = 0.08 gm of heroin

1 gm of Dextropropoxyphene/Propoxyphene-

Bulk = 0.05 gm of heroin

1 gm of Ethylmorphine = 0.165 gm of heroin

1 gm of Hydrocodone/

Dihydrocodeinone = 0.5 gm of heroin

1 gm of Mixed Alkaloids

of Opium/Papaveretum = 0.25 gm of heroin

1 gm of Opium = 0.05 gm of heroin

Cocaine and Other Schedule I and II

Stimulants

1 gm of Cocaine = 0.2 gm of heroin

1 gm of N-Ethylampheta-

mine = 0.4 gm of cocaine/

0.08 gm of heroin

1 gm of Fenethylline = 0.2 gm of cocaine/
0.04 gm of heroin

1 gm of Amphetamine = 1.0 gm of cocaine/
0.2 gm of heroin

1 gm of Dextroamphetamine-

mine = 1.0 gm of cocaine/

0.2 gm of heroin

1 gm of Methamphetamine-

mine = 2.0 gm of cocaine/

0.4 gm of heroin

1 gm of L-Methamphetamine/

Levomethamphetamine/

L-Desoxyephedrine = 0.2 gm of cocaine/

0.04 gm of heroin

1 gm of Phenmetrazine = 0.4 gm of cocaine/

0.08 gm of heroin

1 gm of Phenylacetone/

P2P (methamphetamine

precursor) = 0.833 gm of cocaine/

0.167 gm of heroin

1 gm of Cocaine Base

("Crack") = 100 gm of cocaine/

20 gm of heroin

Part K-Departures

2. GENERAL PROVISIONS

Section 5K2.0 Grounds for Departure

(Policy Statement)

Under 18 U.S.C. Section 3553(b) the

sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds "that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing. Nonetheless, the present section seeks to aid the court by identifying some of the factors that the Commission has not been able to fully take into account in formulating precise guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the

Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing judge. Similarly, the court may depart from the guidelines, even though the reason for departure is listed elsewhere in the guidelines (e.g., as an adjustment or specific offense characteristic), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where the applicable guidelines, specific offense characteristics and adjustments do take into consideration a factor listed in this part, departure from the guideline is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense of conviction. Thus, disruption of a governmental function, Section 5K2.7, would have to be

quite serious to warrant departure from the guidelines when the offense of conviction is bribery or obstruction of justice. When the offense of conviction is theft, however, and when the theft caused disruption of a governmental function, departure from the applicable guideline more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the offense of conviction is robbery because the robbery guideline includes a specific sentence adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines.

Simply because it was not listed does not mean that there may be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

Harms identified as a possible basis for departure from the guidelines should be taken into account when they are relevant to the offense of conviction, within the limitations set forth in Section 1B1.3.

Section 5 K2.13 Diminished Capacity

(Policy Statement)

If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other

of 18 in the

Drug Quantity Table.

DRUG EQUIVALENCY TABLES

Schedule I or II Opiates

1 gm of Alpha-

Methylfentanyl = 100 gm of heroin

1 gm of Dextro-

moramine = 0.67 gm of heroin

1 gm of Dipipanone = 0.35 gm of heroin

1 gm of 3-Methyl-

fent

AMENDMENT V

(Rights of Accused in Criminal Proceedings)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

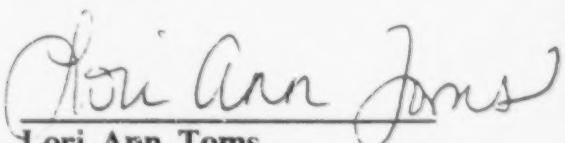
AFFIDAVIT

I, Lori Ann Toms, of Lawyers Printing Company, Inc., attest that the following statement is true and exact to the best of my knowledge and belief:

On this 7th day of June, 1990, I, Lori Ann Toms, hereby certify that I filed with the Clerk's Office of the United States Supreme Court the foregoing Petition for Writ of Certiorari. I further certify that, in accordance with Rule 29.5(c) of the rule of the Supreme Court of the United States, I mailed this same date the required copies to the opposing counsel listed below:

Gregory Welsh
United States Attorney
820 U.S. Court House
101 West Lombard Street
Baltimore, Maryland 21202-2692
(301) 539-2940

Counsel for Respondent -
United States of America



Lori Ann Toms
Lawyers Printing Co., Inc.
701 East Franklin Street
Suite B-115
Richmond, Virginia 23219
(804) 648-3664

STATE OF VIRGINIA)
CITY OF RICHMOND)
)

to-wit:

Lori Ann Toms appeared before me this 7th day of June, 1990, and attested that the foregoing affidavit is true and exact to the best of her knowledge and belief.

My commission expires: 12/23/90.

Donna M. Laotzer
Notary Public



